IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1258

THE STATE OF MINNESOTA, by WARREN SPANNAUS, its Attorney General,

Petitioner

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent

NO. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent.

AMICUS CURIAE BRIEF ON BEHALF OF THE STATE OF IOWA

INTEREST OF THE AMICUS CURIAE

The State of Iowa at the present time is a party to a case pending in the Iowa Supreme Court, Civil Appeal No. 61053, entitled *State of Iowa ex rel Richard C. Turner, Attorney General v. First of Omaha Service Corporation, et al.* Final arguments have been made in that case and the decision of the Iowa Supreme Court is awaited. The facts of that case are very similar to the facts in the present case. The State of Iowa is very interested in the present case because any decision rendered by this court will have a great bearing on the Iowa case.

The State of Iowa therefore files this Amicus Curiae Brief in support of the position of the State of Minnesota and the Marquette National Bank of Minneapolis.

ARGUMENT

I.

The leading Supreme Court case on interest rates that can be charged by national banks is *Tiffany v. National Bank of Missouri*, 85 U.S. 409, 21 L.Ed. 862, (1873).

The present case gives this court an opportunity to re-examine and clarify the law in this area.

There are two basic questions that must be answered. The first question comes up in the situation where a state provides one interest rate for bank loans and a different higher interest rate for some other kind of lender. In *Tiffany* the court held that a national bank had the choice of charging the interest rate allowed to state banks or to any other interest rate allowed to lenders. This holding gave rise to what has come to be known as the "most favored lender doctrine" and has been expanded by lower courts even further.

The plaintiff believes that the court in *Tiffany* misinterpreted the relevant sections of law. The statement made by the court to justify its position will not stand scrutiny.

The *Tiffany* court stated in essence in 85 U.S. at pages 411 and 412 that if national banks were not allowed to charge a higher rate than state banks, where other lenders were allowed to charge that rate, states could in effect discriminate against national banks and put them out of business. This argument will not stand up to a commonsense analysis. Presumably, if national banks were not able to do business at the rate allowed state banks, then the state banks would not be able to do business either. It is extremely unlikely that the legislatures would pass laws so strict that state banks would not be able to do business. On the other hand if the laws are such that state banks are able to do business, then national banks should be able to successfully conduct their business.

The State of Iowa agrees with a discussion of this question found in 58 Iowa L.Rev. 1240 (1973) where after a lengthy analysis of the legislative history of 12 U.S.C. § 85, the author concludes that the *Tiffany* court misinterpreted this section. The intent of the statute was to limit national banks to the general interest rate of a particular state unless a *different* rate was allowed for state banks. The State of Iowa believes that the "different" rate might be either a higher or lower rate and not just a higher rate as the *Tiffany* court presumed.

There is no rational reason at the present time, and the State of Iowa doubts that there ever was, for allowing a national bank to charge a rate higher than allowed to state banks. A commonsense reading of the statute shows that national banks were intended to be limited by the same laws as state banks.

II.

The second question that is presented in this case is the question of what interest rate may a national bank with its main place of business in one state charge when making loans to residents of a different state.

The Minnesota Supreme Court, very reluctantly, and because it felt itself bound by *Fisher v. The First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976) and *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977), held that a national bank with its principal place of business in Nebraska could charge the same rate in making a loan to a resident of Minnesota that it could charge in making a loan to a resident of Nebraska. Under the *Fisher* cases, it should also be pointed out that if Minnesota allowed its state banks to charge a higher rate than Nebraska allowed its lenders, then a Nebraska national bank making loans to Minnesota residents would be allowed to charge the same rate that Minnesota state banks could charge.

In this brief, the question of what a Nebraska national bank can charge a Minnesota resident will be examined from two points of view. The first point of view will be on the assumption that a Nebraska national bank would be limited to the rate of interest that a Nebraska state bank could charge. Secondly, the question will be examined assuming that the most favored lender doctrine is valid and that a Nebraska national bank would be allowed to charge a Nebraska resident the interest rate allowed to any other lender in the State of Nebraska in making that particular kind of loan to that particular classification of borrower.

If it is determined that Nebraska national banks are limited

by the same laws that limit state banks in the collection of interest rates then a Nebraska national bank making loans to Minnesota residents would only be able to charge the rate that could be charged by Nebraska state banks. However, if national banks are allowed to charge the rate of the most favored lender, then a Nebraska national bank would be allowed to charge the rate allowed to the most favored lender located in Nebraska in making loans to Minnesota residents.

If a Nebraska national bank is only allowed to charge the interest rate that a state bank could charge in making a given kind of loan to a given customer then the question becomes whether in making loans to Minnesota residents a Nebraska state bank would be allowed to charge the rate allowed in making loans to residents of Nebraska or the rate allowed by Minnesota to lenders making loans to Minnesota residents. In other words would a Nebraska state bank be allowed to charge a Minnesota resident the rate it could charge a Nebraska resident or would it be limited to charging the rate that Minnesota allows lenders to charge when making loans to Minnesota residents.

The pertinent Minnesota law in this regard is Minn. St. 48.185 which provides:

> "Subd. 6. This section shall apply to all open-end credit transactions of a bank or savings bank in extending credit under an open-end loan account or other open-end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services, and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open-end credit arrangement specifying;
>
> (a) That the law of another state shall apply;
>
> (b) That the person consents to the jurisdiction of another state; and
>
> (c) Which fixes venue; is invalid with respect to open-end credit transactions to which this section applies."

This section clearly applies to out-of-state banks entering into open-end credit arrangements with Minnesota residents.

The constitutionality of such provisions has been upheld in *Aldens, Inc., v. Packel,* 524 F.2d 38, (3rd Cir. 1975) Cert. Den. 425 U.S. 943, 48 L.Ed 187, 96 Sct. 1684 (1976) and in *Aldens, Inc., v. LaFollette,* 552 F.2nd 745, (7th Cir. 1977).

Those cases both involved factual situations where the involvement of the seller, Aldens, with the states was even less than that of First of Omaha Service Corporation and the Omaha Bank. Aldens is a mail order house selling merchandise solely through the mail. Even so, Pennsylvania and Wisconsin laws requiring Aldens to adhere to their interest rate limitation statutes were upheld.

It is clear, then, that a Nebraska state bank making a credit card loan to a Minnesota resident would be allowed to charge no more than the rates allowed by Minnesota law. This rate, of course, is 1 percent per month plus an annual charge not to exceed $15.

The State of Iowa believes that it is clear that this is the rate that should apply to a national bank located in Nebraska rather than the rate that a Nebraska state bank would be allowed to charge a Nebraska resident.

Even if we concede the validity of the most favored lender doctrine, which we do not, the same result occurs.

If there are other Nebraska lenders who would be allowed to charge a higher interest rate than a Nebraska state bank in making loans to Nebraska residents then, if the most favored lender doctrine is correct, a Nebraska national bank making those kinds of loans to Nebraska residents would be allowed to charge that higher rate. However, it is clear that a Nebraska lender other than a state bank, in making loan to Minnesota residents would still be subject to 48.185, subdivsion 6. Therefore, a national bank should be subject to the same provisions.

The basis even of the most favored lender doctrine is to allow national banks so-called competitive equality in the market place. The theory of the most favored lender doctrine is that if there is some other lender other than a state bank that is allowed to charge higher interest rates than the state bank, then in order to obtain competitive equality the national bank should be allowed to do so also. However, this reasoning and purpose does not apply when a loan is made to a resident of another state. Competitive equality does not come into play if the other Nebraska non-national bank lenders would not be able to charge the higher interest rate in making loans to residents of other states such as Minnesota. Competitive equality would require one to examine the rate that other lenders can charge in making loans to Minnesota residents. The national bank should then be allowed to charge that rate but not a higher rate.

If the national bank is required to adhere to the Minnesota law then it has absolute equality with other lenders competing in the Minnesota market.

It makes no sense at all to allow a Nebraska national bank to charge Minnesota residents a rate that no other lender whether state or national or whether located in Nebraska or Minnesota would be allowed to charge in making similar loans to Minnesota residents.

If Nebraska national banks can charge a higher rate than anyone else, then they do not have equality but superiority. It is hard to imagine that any rational person could argue that congress intended to give national banks complete superiority over any other lender. This flies in the face of all of the legislative history of the National Banking Act.

CONCLUSION

In order to actually preserve competitive equality the Minnesota Supreme Court should be reversed and instructed to grant the injunction prayed for by the State of Minnesota. To allow the Minnesota Supreme Court's ruling to stand will result in a gross injustice not only in Minnesota but in many other states, such as Iowa, where outside national banks are seeking to charge higher interest rates than allowed by the state where the borrower resides. The Minnesota Supreme Court's ruling will go a long way toward depriving the states of their right, under their police power, to set limits on interest rates that can be charged to their citizens. This right has traditionally been left to the states and should remain there.

Dated July 6, 1978.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

BY: _____
JULIAN B. GARRETT
Assistant Attorney General

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on 7-6, 19 78.

Richard C. Turner
Attorney General of Iowa

s/ Julian B. Garrett